Supreme Court, U.S.
FILED
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No. 96-828

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

RICHARD A. and CINDY A., Petitioners,

v.

JAMES R. and COLLETTE R.,
and VISTA DEL MAR CHILD AND FAMILY SERVICES, Respondents.

MOTION FOR LEAVE TO FILE IN FORMA PAUPERIS

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Attorneys for Petitioners
RICHARD A. and CINDY R.
By appointment of the Court of Appeal under the California Appellate Project on an independent basis

16 pp

The Respondents ask leave to file the attached Response to Petition for Writ of Certiorari *in forma pauperis*.

Respondents have previously been granted leave to proceed *in forma pauperis* in the following courts:

1. Court of Appeal of the State of California
2. Los Angeles Superior Court, State of California.

Respondents' Affidavit or Declarations in support of this Motion are attached hereto.

DATED: March 12, 1997

Janette Freeman Cochran, Esq,
Robert S. Gerstein, Esq,

By _____
Robert S. Gerstein

Attorneys for Respondents
RICHARD A. and CINDY R.

AFFIDAVIT OR DECLARATION IN SUPPORT OF

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, **CINDY RUIZ**, am the Petitioner in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true:

1. Are you presently employed? Yes ■ No □

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.
   Net Pay: $836.00 per month.
   Employer: PJB & Co. Electrical Contractor
   1899 No. Obispo Ave., Signal Hill, CA 90804

   b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received. **N/A**

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes □ No ■

3. Do you own any cash or have a checking or savings account? Yes ■ No □
   $300.00 in savings account

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
   Yes ■ No □
   1984 Ford Tempo Automobile, value $1,500.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons. Son, Anthony, Age 5 and Son, Richard, Age 4

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 7, 1997.

Cindy Ruiz

Cindy Ruiz

AFFIDAVIT OR DECLARATION IN SUPPORT OF

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, **RICHARD ADAMS**, am the Petitioner in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true:

1. Are you presently employed? Yes ■ No □

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer: Net Pay: $860.00 per month.
   Employer: Stanley Smith
   12138 Firestone Boulevard
   Norwalk, CA 90650

   b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received. **N/A**

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources?
   Yes □ No ■

3. Do you own any cash or have a checking or savings account? Yes □ No ■

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
   Yes ■ No □
   1984 Ford Tempo Automobile, value $1,500.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons. Son, Anthony, Age 5 and Son, Richard, Age 4

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 7, 1997.

Richard Adams

No. 96-828

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No. 96-5971

IN THE SUPREME COURT OF THE UNITED STATES

October term, 1996

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I. PARENTS ASK THIS COURT TO GRANT THE DRY CREEK RANCHERIA'S PETITION BECAUSE, AS CONGRESS FOUND, YOUNG INDIAN COUPLES IN THEIR POSITION NEED THE HELP OF THEIR TRIBES TO MAINTAIN THE STABILITY OF THEIR FAMILIES.

Parents Cindy R. and Richard A.[1] support Dry Creek Rancheria's Petition because of their belief that young Indian parents (and expectant parents) in the position of Parents

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[1]The Parents are parties to this proceeding. (Petition at p. 11.)

here need the help of their tribes to maintain the stability of their families. Such couples need the help of those who know and appreciate their tribal heritage to learn that there are ways of coping with the pressures of urban life other than giving up their children for adoption outside of the tribe, conduct which impoverishes their tribes, their own lives and the lives of their children.

Further, this Court has held that the rights of the tribe cannot be defeated by the actions of individual members: "Congress determined to subject such placements to the ICWA's jurisdictional and other provisions, even in cases where the parents consented to an adoption, because of concerns going beyond the wishes of individual parents." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 at p. 50 (1989). Tribes should have the authority to define their own membership, and ICWA requires that their definitions be given "full faith and credit." If, on the contrary, the "existing Indian family exception" is accepted, individual parents will have the power to rob their tribes of future generations, and their children of their tribal heritage, by their own neglect of their tribal ties.

If parents must qualify as "existing Indian families" in order to receive the protection of ICWA, tribal help will be denied to those who need it most: those who have not been able to develop strong social, political and cultural ties with their tribes on their own. Thus, the irony of the "existing Indian family exception" is that it ensures tribal guidance to Indian parents in *inverse* proportion to their need for that guidance.

Here, Parents were persuaded by an unscrupulous attorney to relinquish their children in the absence of the tribal support and guidance which ICWA was intended to ensure them. To rule that the tribe is bound by that relinquishment unless they can show that Parents had substantial social, cultural and political ties with the tribe at that time is

to guarantee that ICWA will be ineffectual "to promote the stability and security of Indian tribes and families," 25 U.S.C. §1902, precisely where it is needed most.

II. THIS COURT HAS JURISDICTION TO GRANT THE PETITION BECAUSE THE JUDGMENT FINALLY DEPRIVES THE TRIBE OF ITS AUTHORITY TO DEFINE ITS OWN MEMBERSHIP FOR PURPOSES OF ICWA.

Respondents James and Colette R. contend that this Court does not have jurisdiction to grant the petition because the order of the Court of Appeal remands the case to the trial court to determine whether Parents had "an existing Indian family" at the time they relinquished the twins (R.'s Opposition to Petition, pp. 12-17).

But this case falls into two of the categories which this Court has held to comprise the "penumbral area" of finality, *Radio Station WOW v. Johnson*, 326 U.S. 120 at 124 (1945), justifying the conclusion that the Federal issues raised here *have* been decided finally for purposes of this Court's review, though there will be further state court proceedings.

Taking a "pragmatic approach," *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469 at 486, this Court has held there is sufficient finality where the "... federal issue ... will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting Corp. v. Cohn*, *supra*, 420 U.S. at 480. Further, this Court has held that the state court decision is final for purposes of review where the ensuing state proceedings would themselves violate the Federal right asserted. *Helstoski v. Meanor* (1979) 442 U.S. 500.

Such is the case here. Under the terms of the Court of Appeal decision, Parents and the Rancheria have no alternative except either (1) to give up children who are Indian children according to the explicit language of ICWA or (2) to accept the burden of proving to the trial court that they are "Indian" enough to qualify for the "existing Indian family" exception. Even if Parents prevail at the "existing Indian family" hearing on remand, therefore, the childrens' tribe -- the Rancheria -- will have lost: it will have lost the vital capacity to *define itself* by defining its own membership.

A "tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 at 72, footnote 32. So too, one purpose of ICWA is to ensure that the fate of Indian children is not decided by "nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 at 34-35 (1989) (quoting the testimony of Chief Calvin Isaac). ICWA achieves that purpose by requiring state courts to give "full faith and credit" to the tribe's own definition of membership. 25 U.S.C. §1911(d).

Whatever the outcome of the trial court proceedings on remand, then, the very exercise of the trial court's authority to decide whether Parents were an "existing Indian family" will deprive the Rancheria of its right to define tribal membership, and in particular, to define and ensure the future of the Rancheria by deciding for itself which children shall be counted as members.

Whatever the outcome of those proceedings, it will remain true that the question of the Rancheria's membership has been submitted to "nontribal government authorities who

have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing," *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. at 34-35, *supra*.

Because the California court's imposition of the "existing Indian family exception" is now a final adjudication denying the Rancheria its right to define itself for purposes of ICWA, this Court has jurisdiction to review it now. *Abney v. United States* (1977) 431 U.S. 651 at 659.

III. THE STATUTORY AND CONSTITUTIONAL ISSUES IN THIS CASE ARE RIPE FOR REVIEW.

Respondents further assert that the issues of statutory and constitutional interpretation raised by the Petition are not ripe for review because those issues are presented in an abstract rather than a concrete form (R.'s Brief in Opposition to Petition, pp. 2028).

This assertion is untrue. This case presents the "existing Indian family" issue in a concrete situation. As shown above, the decision below would deprive the Rancheria of the concrete right to define its own membership. It is therefore ripe for review.

Indeed, Respondent R.'s assertion that this case is not ripe for review on the constitutional and statutory issues is belied by their own description of the opinion below and the process which gave rise to it:

> ... [T]he California Court of Appeal opinion was thorough, scholarly, and correct legally. The Court of Appeal had the benefit of extensive briefing and the assistance of numerous amicus curiae briefs from various organizations throughout the nation. In contrast to various other state court opinions in which the constitutional issues have been dealt with in a summary fashion, this particular opinion includes extensive

analysis of these issues after thoughtful consideration of the most recent opinions from the Supreme Court.

R.'s Brief in opposition, pp, 11-12.

The factual record necessary for appropriate consideration of the issues the Rancheria raises here was made in the trial court. It was established as matter of fact that Bridget and Lucy are the biological children of a father who has been a member of Dry Creek Rancheria since birth, and that, as lineal descendants of historic members of the Rancheria, Bridget and Lucy are eligible for membership in the Rancheria (Opinion, p. 8). They are, therefore, Indian children according to the explicit language of the ICWA definition in 25 U.S.C. §1903(4), and, but for the application of the "existing Indian family" gloss, the Rancheria would have had the authority under ICWA to ensure that they would not be lost to the tribe.

IV. RANCHERIA HAS NOT MISSTATED THE LAW OR THE FACTS.

R.'s assert that the Petition should be denied under this Court's Rule 15(2) because Petitioners have misstated facts and law (Respondent R.'s Brief in opposition, p. 17, *et seq.*). In reality, however, they have failed to show any such misstatement.

First, R.'s assert that the Rancheria's description of Bridget and Lucy as "Indian children" is an egregious misstatement (Brief in Opposition, p. 17). However, they contradict the opinion they seek to defend. The Opinion stated "undisputed" that "the twins are now recognized by the Tribe as tribal members." (Opinion, p. 5.)

The fact is that Bridget and Lucy clearly fall within ICWA's definition of Indian children as stated in 25 U.S.C. §1903(4), and are therefore "Indian children" within the

meaning of ICWA. The decision below would impose the "existing Indian family exception" as a limit on the enforceability of ICWA, and would therefore mean that Bridget and Lucy would be denied ICWA's protection unless the trial court finds that their family meets the requirements of the exception. The fact that the twins would be denied the protection of ICWA by operation of the exception does not, however, mean that they cease to be *Indian children* within the clear meaning of the Act.

Second, R.s assert that it is not a fact that Father has been a member of the Dry Creek Rancheria since birth (Brief in Opposition, p, 18). On that point, however, they contradict the opinion they seek to defend. The Court of Appeal opinion itself recites that Father, as a "lineal descendent of a historic tribal member was automatically a member of the Tribe and was recognized as such from birth" (Opinion, p. 7). It is R.s who misstate the facts, with their erroneous claim that they can continue to contest the issue of Father's membership in the Rancheria in this Court.

Respondents also assert that the Rancheria engaged in a "pivotal misrepresentation" when it said that Father conveyed a "withdrawal of his consent to the twins' adoption...," because Father had signed what is technically called a "relinquishment" rather than "consent" (Brief in Opposition, p. 19). This is nonsense. The Opinion specifically states that the parents "purportedly withdrew their consent." (Opinion, p. 5) That is also the terminology of the ICWA (25 U.S.C. §§1913, 1914.) The Rancheria made it clear that both Parents signed "relinquishments" (Petition, p. xvi). In later stating that Father had withdrawn "his consent to the twins' adoption," the Rancheria, like the Court of Appeal, was using the phrase descriptively, not technically. No one could possibly be misled by this common-sense description of what occurred.

Finally, the R.s object to a reference to the report filed with the trial court by Dr. Dixie Noble (Brief in opposition, p. 19). Though not denying that the report was filed, or that its content was accurately reported. R.s insist that is irrelevant. As the reference was made only in passing, and has no direct relevance to the vital issues the Petition puts before this Court, the R.s' objection is irrelevant, and should have no bearing on this Court's decision on the Petition.

V. THIS COURT CAN BRING THIS CASE TO A SPEEDY CONCLUSION AND CREATE ORDER OUT OF THE CURRENT CHAOS IN THE INTERPRETATION OF ICWA BY REJECTING THE "EXISTING INDIAN FAMILY" EXCEPTION.

Parents join the R.s in believing that this case should be concluded as speedily as possible in the interests of their children. Parents do not agree, however, that this goal will be achieved by this Court's rejection of the Rancheria's Petition (R.'s Brief in Opposition, p. 29).

The R.s ignore the fact that Bridget and Lucy currently face an extensive proceeding on remand which can only be avoided if this Court grants review and rejects the "existing Indian family" doctrine and the Court of Appeals other Constitutional arguments, thereby bringing the entire case to a speedy close.

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CONCLUSION

For the reasons stated above, Parents support the Rancheria's Petition and respectfully request that this Court grant it.

DATED: March 12, 1997

Respectfully submitted,

Janette Freeman Cochran, Esq,
Robert S. Gerstein, Esq,

By _____
Robert S. Gerstein

Attorneys for Respondents
RICHARD A. and CINDY R.